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UJA SDN BHD

v.

UNITED OVERSEAS BANK (MALAYSIA) BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[ORIGINATING SUMMONS NO: S3-24-1160-2006]
9 OCTOBER 2007

C ***LAND LAW:*** *Lien - Creation - Removal of lien-holder's caveat - Whether registered proprietor of land could deposit title to a lender as security for loan granted to third party - Order for sale - Whether bank entitled to benefit of lien - National Land Code, s. 281(1), (2)*

D This was an application by the plaintiff seeking that a lien-holder's caveat registered by the defendant bank against certain property belonging to the plaintiff ('said property') be removed by the defendant or by the Land Administrator, and that the defendant deliver to the plaintiff the title to the said property. The defendant had granted banking facilities to a company called Union Plastics E Sdn Bhd ('Union Plastics') totalling RM6,200,000, with one of the securities for the banking facilities being the creation of a lien-holder's caveat over the said property. The plaintiff agreed to the creation of the lien-holder's caveat under s. 281(1) of the National Land Code ('Code'), and deposited the title to the said property F with the defendant. Union Plastics subsequently defaulted on the loans. The defendant sued Union Plastics for the default and obtained judgment. The defendant, armed with the lien over the said property and the judgment, applied for an order for sale G pursuant to s. 281(2) of the Code.

Held (dismissing the application):

(1) Section 281 of the Code does not prohibit a registered proprietor of land to deposit his title to a lender as security H for a loan granted to a third party. Subsections (1) and (2) of s. 281 of the Code permit the creation of a lien-holder's caveat in favour of a lender over property which is provided as security for a loan granted to a person other than the proprietor himself. In the present case, since the judgment I which was obtained by the plaintiff against the borrower had

not been satisfied and all sums due under the lien had not been duly paid, the defendant therefore was entitled to the benefit of the lien. *Hong Leong Finance Bhd v. Staghorn Sdn Bhd* (refd); *Perwira Affin Bank Bhd v. Selangor Properties Sdn Bhd & Ors* (refd). (paras 15 & 16)

Case(s) referred to:

Hong Leong Finance Bhd v. Staghorn Sdn Bhd & Other Appeals [2005] 2 CLJ 1 CA ***(refd)***

Perwira Affin Bank Bhd v. Selangor Properties Sdn Bhd & Ors [2003] 5 CLJ 310 HC ***(refd)***

Legislation referred to:

National Land Code, s. 281(1), (2)

For the plaintiff - Paul Kwong; M/s Azman Davidson & Co
For the defendant - SK Sivam; M/s PG Lim & Co

Reported by Suresh Nathan

JUDGMENT

Hishamudin Mohd Yunus J:

[1] Enclosure 1 is the plaintiff's application by originating summons for the following orders:

(a) that the lien-holder's caveat registered by the defendant on 22 April 2002 against the property known as GM 511 Lot No, 9553, Mukim of Cheras, District of Hulu Langat be removed by the defendant or by the Land Administrator;

(b) that the defendant deliver to the plaintiff the title to the said property;

(c) that the defendant pay damages to the plaintiff; and

(d) costs.

[2] I have dismissed the application with costs, and I now give the grounds for my decision.

[3] The defendant bank had by a letter of offer dated 12 March 2002 granted banking facilities to a company called Union Plastics Sdn Bhd ("Union Plastics") totalling RM6,200,000. One of the

securities for the banking facilities was the creation of a lien holder's caveat over a property known as GM 511 Lot No, 9553. Mukim of Cheras, District of Hulu Langat ("the said property") belonging to the plaintiff.

[4] Pursuant to its board of directors' resolution of 10 April 2002, the plaintiff pledged the said property to the defendant to secure the credit facilities granted by the defendant to Union Plastics. The plaintiff agreed to the creation of a lien-holder's caveat under s. 281(1) of the National Land Code by the defendant as a security for the said credit facilities and deposited the title to the said property with the defendant. The defendant's lien-holder's caveat was registered on 22 April 2002.

[5] Subsequently, the borrower under the credit facilities, that is to say, Union Plastics, defaulted on the loans. The defendant bank sued Union Plastics for the default and obtained judgment. Armed with the lien over the said land and the judgment, the defendant *vide* originating summons No: S3-24-2162-2004 applied for an order for sale pursuant to s. 281(2) of the National Land Code.

[6] Upon hearing the originating summons No: S3-24-2162-2004, I had struck out the defendant's (the present defendant, United Overseas Bank, was the plaintiff in that originating summons) application. In that originating summons case, I was impressed by and had accepted the argument of the defendant (the present plaintiff, UJA Sdn Bhd, was the defendant in that originating summons) that the creation of the lien was null and void and unenforceable and held that the plaintiff in that case, United Overseas Bank (the defendant in the present case), had no reasonable cause of action against the defendant. In that case, the defendant had referred to the Court of Appeal's decision in *Hong Leong Finance Bhd v. Staghorn Sdn Bhd & Other Appeals* [2005] 2 CLJ 1. The Court of Appeal in that case said:

> Thus it is material in the creation of a lien holder's caveat under s. 281 NLC to have the registered proprietor to deposit the document of title to the lender for it is the registered proprietor who intends to surrender his rights to the lender to deal with the said land in the event of default in repayment of the loan which he obtained from the lender. As a borrower, no other person can substitute the registered proprietor in performing this task of depositing the document of title with the lender for the creation

of this statutory instrument. To allow this would defeat the concept of the right of the registered proprietor to deal with his own land. Section 281 NLC is intended for a registered proprietor to raise money on loan, speedily, by depositing the document of title registered in his name with the lender as compared with the more complex process of registering a legal charge over the land. But as the law demands, it is only available to a registered proprietor who borrows money and deposits his title with the lender. It does not extend to a beneficial owner who is yet to become a registered proprietor. Since this facility is only available to the registered proprietor, in the event of default in repayment of the loan, judgment must be obtained against the registered proprietor, as borrower. The wordings in s. 281(2) NLC of a "holder of any lien has obtained judgment for the amount due to him" is clear to this effect for there can be no one else other than the registered proprietor who is the borrower.

[7] I accepted then that the above judgment supported the defendant's contention.

[8] However, subsequent to delivering my decision in that case (originating summons No: S3-24-2162-2004), and upon deeper reflection, I am now of the opinion that my view on the law at the time of my decision (27 October 2005) regarding the validity of the lien was probably wrong. In the case that it is now before me, I have grave doubts whether the Court of Appeal's decision in *Hong Leong Finance* can be regarded as an authority for the proposition that s. 281 of the National Land Code requires that the registered proprietor of the land, that is to be the security and the subject matter of the lien, must also be the borrower of the loan to which the lien relates.

[9] In *Hong Leong Finance* the Court of Appeal in their judgment focused more on the fact that the party depositing the title to the lender bank/lien-holder (Hong Leong Finance) as security in respect of a loan to a third party (Park Avenue Homes Sdn Bhd) was not the registered proprietor of the land (the registered proprietors were the 1st and 2nd defendants in that case). Hence, any suggestion in the judgment in *Hong Leong Finance* to the effect that the registered proprietor of the land must also be the borrower is mere *obiter dicta*.

[10] In my view, it is not the *ratio decidendi* of *Hong Leong Finance* that a lien-holder's caveat is invalid if the registered proprietor of the property is not also the borrower himself. The *ratio decidendi* of *Hong Leong Finance* is that the registered proprietor of the title himself must deposit the title with the lender to enable the lender to create a lien-holder's caveat on the title under s. 281 National Land Code. In the said case, it was not the registered proprietor who deposited title. It was deposited by a purchaser claiming as the beneficial owner of the land. For the creation of a lien-holder's caveat, it is the registered proprietor of the land who must deposit the title with the lender (in this regard, I refer to my decision in *Perwira Affin Bank Bhd v. Selangor Properties Sdn Bhd & Ors* [2003] 5 CLJ 310).

[11] A closer look at s. 281(1) of the National Land Code reveals that there is no direct or indirect prohibition on the registered proprietor for the creation of a lien-holder's caveat as security for a loan taken by a third party. Therefore, in my view, s. 281 of the National Land Code does not prohibit the owner of a property from depositing his title with a lender as security for a loan granted to a third party.

[12] Section 281(1) National Land Code states:

> **281. Creation and effect, of liens**
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> (1) Any proprietor or lessee for the time being may deposit with any other person or body as security for a loan, his issue document of title or, as the case may be, duplicate lease, and that person or body –
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> (a) may thereupon apply under Chapter 1 of Part 19 for the entry of a lien-holder's caveat; and
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> (b) shall, upon the entry of such caveat, become entitled to a lien over the land or lease.
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> (2) Where the holder of any lien has obtain judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.

[13] Section 281(1) merely states that a proprietor may deposit his title as security for a loan. It does not state that it has to be as a security for a loan to the proprietor. As such the loan could be to anyone. In other words, the proprietor may deposit his title as a security for a loan to a third party.

[14] Further, subsection (2) of s. 281 states that where the holder of any lien has obtained judgment for the amount due to him under the lien, he shall be entitled to apply to court for, and obtain forthwith, an order for the sale of the land or lease. This subsection does not say that the amount due to the lender has to be from the proprietor.

[15] In conclusion I hold that s. 281 does not prohibit a registered proprietor of land to deposit his title to a lender as security for a loan granted to a third party. Section 281(1) and (2) permit the creation of a lien-holder's caveat in favour of a lender over a property which is provided as security for a loan granted to a person other than the proprietor himself.

[16] In the present case, as the judgment which was obtained by the plaintiff against the borrower has not been satisfied and all sums due under the lien have not been duly paid, the defendant therefore is entitled to the benefit of the lien.